federal rights that have been recognized by Congress and the Commission. Moreover, these quasi-public restrictions may completely frustrate federal communications policy without any guarantee that the strong federal interests have been weighed against the "local" concerns manifest in the covenants and bylaws. In several cases, restrictive covenants have been interpreted in ways that clearly reflect the lack of consideration afforded federal interests in satellite signal access. Those unreasonable restrictions have resulted in enormous expense and distress for consumers attempting to install satellite receive-only antennas of all sizes -- large, medium and small.

In a 1991 case, for example, Ken and Tina Marie Latera of Boca Raton, Florida, attempted to install an eight foot diameter C-Band antenna, brought from their old house, at a newly purchased house. The Lateras' new home was in a community known as Mission Bay, and they had been assured by an agent of the Mission Bay master HOA that they would be able to install the antenna. The Lateras installed their antenna in September 1991, screening it with a number of ficus trees, and even disguising it to look like a common patio umbrella.[62] (See Exhibit F.) Although the Lateras

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62 See Eliot Kleinberg, Satellite Dish Owner to Keep Fighting, Palm Beach Post, Jan. 14, 1994, at 1B. A homeowner in a subdivision known as Palantine Lake Village in Pittsgrove Township, New Jersey, whose attorney contacted SBCA for assistance with a restrictive covenant purporting
(Footnote 62 Continued)

had obtained approval of the master association's design review committee, a village association nonetheless fined the Lateras $1,000 and sought an injunction and attorneys' fees for violation of the village association's CC&Rs.[63]

The covenant in question, like many HOA restrictions, completely bans the installation of external antennas,[64] stating that "no television or other antenna

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(Footnote 62 Continued)
to bar satellite dishes without the HOA's written consent, similarly attempted to disguise his satellite dish as an umbrella. Despite the homeowner's best efforts to mask his dish in a perfectly innocuous way -- as an ordinary patio umbrella -- his HOA still attempted to force the homeowner to remove his dish.

63 See Appellant's Initial Brief at 1-3, Latera v. Isle at Mission Bay Homeowners Assoc., 20 Fla. L. Weekly 1072 (Fla. Dist. Ct. App. 1995) (No. 93-2952). In June of 1994, the Lateras' attorney received the following letter from the HOA's attorneys: "Now that the New York Rangers have won the Stanley Cup, your clients no longer should need or want their satellite dish to watch the Rangers. Please contact your clients to discuss this matter with them." Letter from Joel L. Roth to Genie Holcombe Deringer, Esquire (June 20, 1994). The outrageousness of this demand speaks for itself.

64 In fact, numerous homeowners and attorneys have contacted SBCA for information regarding just this situation, i.e., CC&Rs that entirely prohibit satellite dishes, prohibit 18-inch dishes specifically, or require prior written approval -- almost never given -- of an HOA. Through these informal contacts, SBCA has been informed of such restrictions in the following communities: Virginia Run, Centreville, Virginia (total ban); Ridgemoor Subdivision, Schererville, Indiana (total ban); Kopadruck Ridge Estates, Gig Harbor, Washington (total ban; HOA recommended cable service as a preferable alternative); Galena County Estates, Reno, Nevada (total ban on satellite antennas, but permits television antennas less than eight feet in height); Oak Run Subdivision, Ballwin, Missouri (total ban); Gold Hammock, Highlands County, Florida (total ban unless lot is larger than one acre); Crockett Cove, (Footnote 64 Continued)

system or facility shall be erected or maintained on any Lot."[65] The court found that the satellite dish installed by the Lateras was prohibited by the terms of the covenant.[66] It gave no indication, however, that it considered whether any federal interest might render the covenant void as against public policy. Unfortunately, the Lateras have not only lost the right to install their satellite antenna, they have also suffered foreclosure on their home because the trial court ordered a foreclosure sale to pay attorneys' fees granted the homeowners' association. Indeed, the Lateras' own legal fees have amounted to $33,000 -- more than four times the total

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(Footnote 64 Continued)
Brentwood, Tennessee (total ban); Cross Creek Village Condominiums, Playa Del Rey, California (specific ban on 18-inch dishes); Leisure Village, Camarillo, California (specific ban on 18-inch dishes); Green Meadows West, Covina, California (specific ban on 18-inch dishes); Buena Park Summertree Development, Alisa Viejo, California (specific ban on 18-inch dishes); Continental 805 development, Inglewood, California (specific ban on 18-inch dishes); The Summit at Stone Oak, San Antonio, Texas (HOA approval required); Awbrey Butte Homesites, Bend, Oregon (HOA approval required); Huckleberry Community, Orlando, Florida (HOA approval required). We emphasize that these are but the few examples of restrictive covenants of which SBCA is aware. Certainly, many more examples of such discriminatory CC&Rs exist. As is readily evident from this small sample, however, these onerous restrictions span the nation.

65 See Latera, 20 Fla. L. Weekly at 1072.

66 Id.

installed cost of their antenna and the ficus trees.[67] The Lateras have since petitioned for rehearing en banc.

In a similarly egregious case, Douglas Irvin of Waldorf, Maryland bought and installed a patio umbrella-type C-Band antenna (similar to that pictured in Exhibit B) in 1991. He has been embroiled in a heated dispute with his homeowners' association board ever since. A trial of the issues in Mr. Irvin's case is scheduled for August 1995. The dispute revolves around the architectural guidelines drawn up by a committee of his homeowners' board and the approval for the installation that the homeowners' board first granted and then attempted to revoke. The restriction in question, contained in the committee's architectural guidelines, required written approval of "satellite dishes," but also required committee action within 30 days of any request for approval or the request was to be considered granted. The committee gave "tentative approval" 35 days after Mr. Irvin's request, "pending board approval." On the 37th day, Mr. Irvin installed his umbrella antenna. On the 39th day, the board revoked approval and ordered Irvin to remove his antenna. Thus far, he has refused.

In another example, a resident in a community governed by restrictive covenants in Fairfax County,

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67 James B. Goodger, Florida Man Fights to Keep Umbrella Dish, Satellite Business News 1994, at 12.

Virginia, attempted to avoid application of the HOA's rules by installing a satellite dish disguised as a common picnic table. When the HOA became aware of the antenna, it requested the removal of the satellite antenna and eventually took the homeowner to court. The homeowner spent a considerable amount of money in litigation, but ultimately lost and was forced to remove the satellite dish.[68]

These are but a few examples of the tremendous difficulties faced by consumers seeking to obtain DTH services in areas governed by HOAs. Like the local ordinances and permitting regulations faced by other consumers of DTH satellite services, the CC&Rs are drawn broadly -- indeed, often well beyond the limits of the FCC's rule. They often bar antennas entirely or satellite dishes specifically, but without any consideration of whether the antennas in question threaten the alleged "aesthetic" (or other) interests of neighbors. Prospective homeowners have little if any ability to change their CC&Rs. Instead, they are subjected to the vagaries of their HOAs. The Commission should consider whether federal interests generally furthered by access to satellite communication should be subject to the arbitrary and open-ended whims of various HOAs. Indeed, the arbitrary character of HOA rules --

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68 Susan Katz Keating, Rights vs. Reality: Big Brother in the 'Burbs; HOAs More Than Just The Lawn Arm of the Law, The Washington Times, Apr. 19, 1992, at A-1.

typically justified by "aesthetic" concerns -- is particularly apparent in communities festooned with highly visible cable television amplifier and access boxes. These same HOAs nevertheless vigorously police the installation of 18-inch satellite antennas.[69]

As noted at the outset of these Comments, a critical federal interest triggering the Commission's decision to adopt a preemption policy is the Congressional mandate, as set forth in Section 1 of the Communications Act, to make communications services available "to all the people of the United States." HOAs govern an increasingly large percentage of homes; indeed, in some areas as much as 75 percent of new home construction is subject to some sort of HOA restriction.[70] Accordingly, the Commission's effort to facilitate receipt of satellite services by all people

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69 Exhibit D pictures a high power Ku-Band antenna and cable boxes in the same community. A homeowner took these photographs in his community, Palm Desert, California, as part of a campaign that he described as "very difficult," to change the community CC&Rs to allow high power Ku-Band antennas installed on the outside of residences.

In another community governed by restrictive covenants, Hunters Creek in Orlando, Florida, a homeowner unsuccessfully attempted to install a satellite dish. The resistance he met was two-fold: First, the CC&Rs explicitly forbid all satellite dishes; and, second, the subdivision owned its own cable company making it especially unfriendly toward satellite service. Angela M. Duff, Action Spells M-O-N-E-Y, TVRO Dealer, Mar. 1994, at 19.

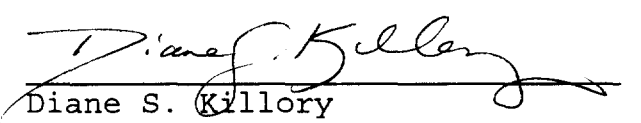
70 See Monica Hogan, If You Can't Beat'em, Join'em, Satellite Retailer, May 1995, at 31. Nationwide, almost half of all new homes are subject to CC&R's.

will be severely impeded if it cannot bring the HOA problem under control.

CONCLUSION

SBCA commends the Commission for recognizing the need to strengthen the current preemption rule and to correct the procedural mechanisms, although it urges the Commission to adopt a revised procedural process and a stricter preemption policy. With the clarifications and modifications suggested in these Comments, the new rule will fairly balance the needs of local authorities and prospective satellite antenna owners.

Respectfully submitted,



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Counsel for the Satellite
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Association of America

July 14, 1995

EXHIBIT A

DECLARATION OF ARTHUR A. HUTCHINS

I, Arthur A. Hutchins, declare as follows:

1. In 1989 I decided to install a satellite antenna in the yard along the side of my house. At the time, I was a resident of Upper Marlboro in Prince Georges County, Maryland. I hired a local satellite dealer to install the antenna for me. After the dealer partially installed the antenna, and before he was able to connect it, a Prince Georges County building inspector, responding to a complaint from one of my neighbors, placed a "Stop Work" order on the antenna installation. The inspector informed me that I would need both a building permit and an electrical permit in order to install the antenna. I was told that until the county issued these permits to me I would be unable to complete installation. The building inspector also told me that I might face criminal penalties for installing the satellite dish without the necessary permits.

2. After the "Stop Work" order was placed on the antenna installation, I contacted the satellite antenna dealer. The dealer decided to contact the Satellite

Broadcasting and Communications Association of America ("SBCA"), which then drafted a letter to the county alleging violation of the Federal Communication Commission's 1986 Preemption Order. In addition, the dealer and I decided that we should try to get the necessary permits to install the satellite antenna. When we applied for the permits, however, we discovered that we could not receive a building permit unless we had a building license and that we could not receive a building license unless we intended to build homes. We encountered a similar situation when we applied for an electrical permit; we could not receive an electrical permit unless we were licensed master electricians.

3. Even though we did not need a licensed electrician or a licensed builder to install the satellite antenna, in an attempt to comply with the county ordinance, we hired both a licensed electrician and a licensed builder to apply for the necessary permits. In order to shepherd the two permit applications through the 11 separate county offices with approval responsibility for the permits, we also had to hire a permit expediter. In addition, we needed to hire a structural engineer to perform an engineering study of my property and create a foundation plan for the antenna as required by one of the county offices.

4. When we were partially through the permitting process, one of the county offices decided, for "aesthetic" reasons, that the antenna needed to be placed on a 30-foot pole. This decision required a second set of foundation drawings and a second permit expediter to again marshall the permits through the 11-office process. One of the offices even required me to agree to "screen" the antenna, which ultimately led to my planting over 30 eight- to ten-foot pine trees that cost me $75 to $100 per tree.

5. While undertaking the permitting process, I had a number of conversations with county inspectors and other county officials regarding the possibility of criminal charges and related fines. During the course of those conversations, various county personnel often suggested to me that I could resolve all of my permitting problems by subscribing to cable television.

6. After three months and after spending approximately $23,000 in the permitting process alone,[1] the dealer and I received the necessary permits to install the satellite antenna. Two weeks later, however, the county

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1 The dealer graciously agreed to pay these additional costs. Had he not chosen to do so, I could not have afforded to fight the county and I would have simply removed the satellite antenna.

placed a second "Stop Work" notice on the satellite antenna and I was re-subjected to criminal penalties. The county informed me that my permits had been issued in error, but the county never gave me a specific explanation for the revocation. At that point, the dealer had SBCA recontact the county to reiterate the points made in its earlier letter. Within seven months my permits were reissued.

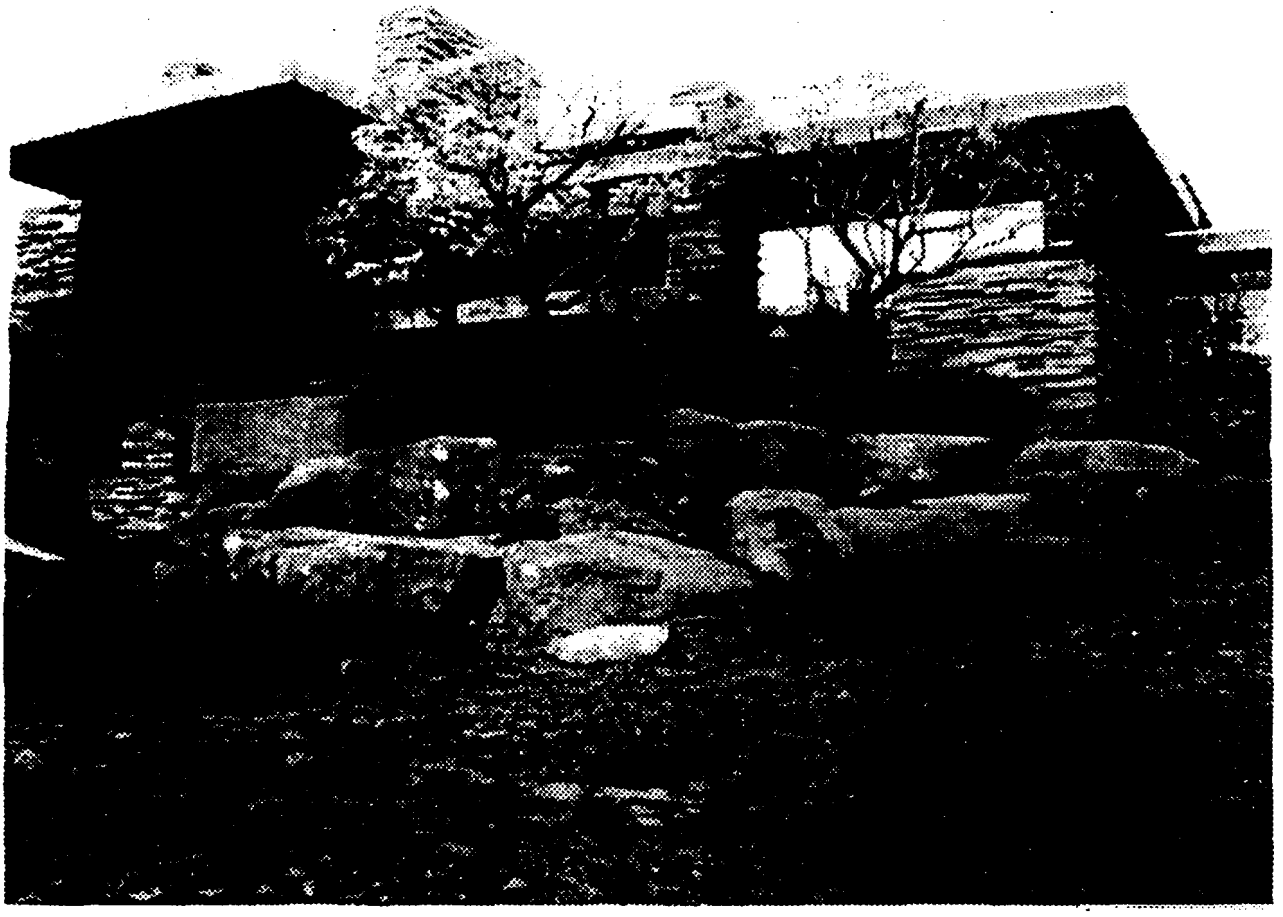
7. At the end of 1990, after over 10 months and more than $23,000 spent on engineering studies, permit expediters, screening, licensed builder fees, licensed electrician fees, and other related costs, the dealer was able to install my satellite antenna on a 30-foot pole surrounded by more than 30 eight- to ten-foot pine trees. The original cost for the satellite antenna and installation was $5,000.

8. I have since moved out of Prince Georges County.

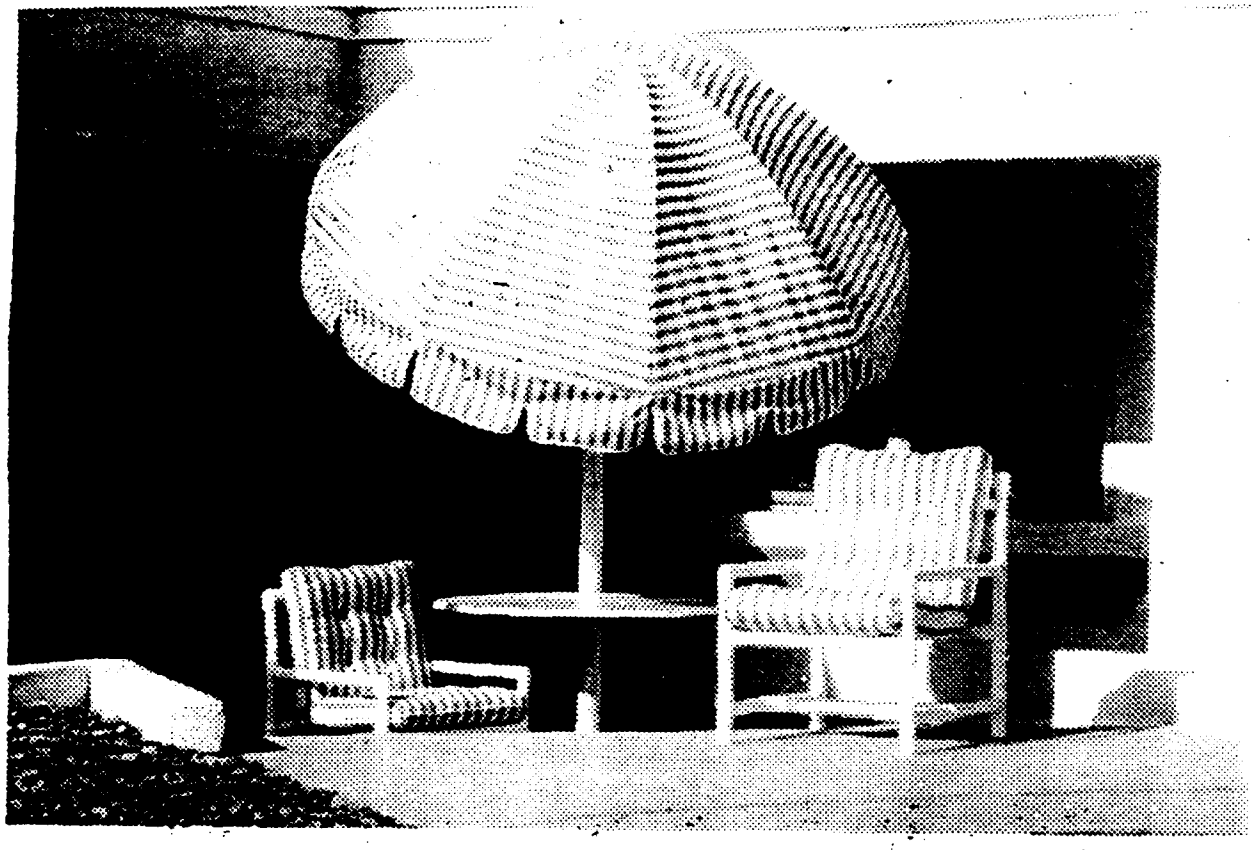
I declare under penalty of perjury that the foregoing is true and correct. Executed on July 12, 1995.

Arthur A. Hutchins

EXHIBIT B



Satellite antenna "disguised" as a rock with natural landscaping.



Satellite antenna "disguised" as a patio umbrella.

EXHIBIT C

PROPOSED LANGUAGE FOR NEW RULE

(a) Except as provided in section (b) below, any state or local zoning, land-use, building, or similar regulation (including any permitting or other compliance-related regulation) that substantially limits transmission or reception by satellite antennas, or imposes costs (including any costs of compliance with such regulation) that exceed a de minimis amount on users of such antennas, is preempted unless the promulgating authority can demonstrate that such regulation is reasonable in relation to:

(1) a health, safety, or aesthetic objective that is clearly defined and expressly stated in the text of the regulation itself with respect to transmitting antennas, or a safety or aesthetic objective that is clearly defined and expressly stated in the text of the regulation itself with respect to receive-only antennas; and

(2) the federal interest in making available to all people of the United States a rapid, efficient, nationwide and

worldwide radio communication service, including the federal interest in ensuring access to satellite-delivered communications services and in promoting fair and effective competition among competing communications service providers.

(b) Any state or local zoning, land-use, building or similar regulation including any permitting or other compliance-related regulation that substantially limits transmission or reception by satellite antennas, or imposes costs (including any costs of compliance with such regulation) that exceed a de minimis amount on users of such antennas, shall be deemed unreasonable and is therefore preempted if the regulation affects the installation, maintenance, or use of:

(1) a satellite antenna that is two meters or less in diameter and is located or proposed to be located in any area where commercial or industrial uses are generally permitted by local land-use regulation; or

(2) a satellite antenna that is one meter or less in diameter in any area regardless of its zoning designation; or

(3) a satellite antenna of any size that is "disguised" to look like an item that is unregulated, e.g., a rock or an umbrella, in any area regardless of its zoning designation.

(c) Any person aggrieved by the application or potential application of a state or local zoning or other regulation in violation of paragraph (a) of this section may, after exhausting all nonfederal administrative remedies, file a petition with the Commission requesting a declaration that the state or local regulation in question is preempted by this section. Nonfederal administrative remedies, which do not include judicial appeals of administrative determinations, shall be deemed exhausted when

(1) the petitioner's application for a permit or other authorization required by the state or local authority has been

denied and any administrative appeal has been exhausted;

(2) thirty days have passed since the petitioner's initial application for a permit or other authorization required by the state or local authority was filed with that authority;

(3) a permit or other authorization required by the state or local authority will require or necessarily result in the petitioner's expenditure of an amount of money greater than a de minimis amount (including any costs of compliance with such requirements); or

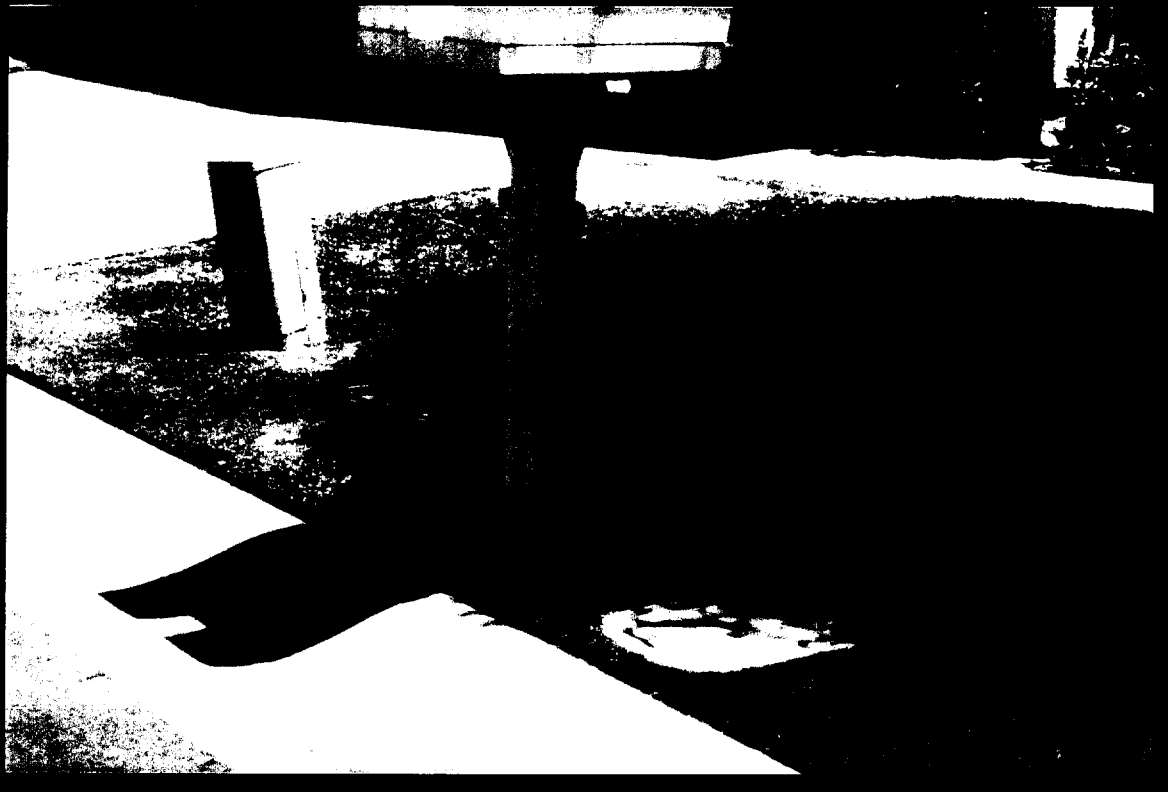
(4) a state or local authority has notified the petitioner of impending civil or criminal action in a court of law and there are no more nonfederal administrative steps to be taken.

(d) Any state or local authority that wishes to maintain and enforce zoning or other regulations

inconsistent with this section may apply to the Commission for a full or partial waiver of this section. Such waivers may be granted by the Commission in its sole discretion, upon a showing by the applicant that local concerns of a highly specialized or unusual nature create an overwhelming necessity for regulation inconsistent with this section. No application for waiver shall be considered unless it includes the particular regulation for which waiver is sought. Waivers granted according to this rule shall not apply to later-enacted or amended regulations by the local authority unless the Commission expressly orders otherwise.

EXHIBIT D

Street views of Palm Desert, California cable television amplifier box (top), and cable television pedestal and power vault (bottom).



Palm Desert, California D.S.S. antenna
as seen from the street.